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No. 89-73

In the Supreme Court of the United States

OCTOBER TERM, 1989

KENNETH M. JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SARA CRISCITELLI
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the forfeiture of a house, a garage, and a five-acre lot used to cultivate marijuana violated the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments.

2. Whether the courts below properly declined to limit the scope of the forfeiture on nonconstitutional grounds.

3. Whether the in rem arrest of the real property comported with due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 861 F.2d 232. The opinion of the district court (Pet. App. A12-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988, and a petition for rehearing was denied on April 14, 1989 (Pet. App. A20-A21). The petition for a writ of certiorari was filed on

July 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed a civil complaint in the United States District Court for the District of Oregon seeking in rem forfeiture under 21 U.S.C. 881 (a)(7) (Supp. V 1987) of a parcel of real property (petitioner Tax Lot 1500) that was used to cultivate marijuana. The district court granted the government's motion for summary judgment, and the court of appeals affirmed.

1. The underlying facts are summarized in the opinions below. Pet. App. A3-A4, A13-A14. The property at issue consists of a house, a garage, and the five acres of land on which they are situated. In August 1985, state law enforcement officers executed a warrant for the search of the premises and seized 143 marijuana plants. Most of the plants were in a garden near the house, but some also were found under a skylight in an upstairs bedroom and on a deck over the garage. E.R. J17.[1] The search also uncovered packaged baggies of marijuana, weighing scales, photographs of growing marijuana, and books containing instructions on the manufacture of drugs. E.R. J18. Petitioner Jaffee, the owner of the property, subsequently pleaded guilty to state charges of manufacturing marijuana, for which he was sentenced to two years' probation. E.R. B4.[2]

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[1] "E.R." refers to the Excerpts of Record filed in the court of appeals.

[2] On June 20, 1986, Jaffee was arrested for being an ex-felon in possession of firearms. On July 9, 1985, his probation was revoked, he was sentenced to six months' imprisonment,

2. On October 16, 1985, following Jaffee's plea of guilty to the state charges, the United States filed the complaint in this in rem proceeding, seeking forfeiture of the parcel of real property pursuant to 21 U.S.C. 881(a)(7). (Supp. V 1987) E.R. A. At the same time, the government filed a motion to issue a warrant for the arrest of the property. The motion was supported by an affidavit of DEA Agent Frank Balazs, which set forth the basis for the probable cause to believe that the property had been knowingly used by Jaffee to cultivate marijuana. E.R. B. After reviewing these materials, the magistrate entered an order for a warrant of arrest, which was promptly issued by the clerk. E.R. C. An affidavit filed in support of the government's motion for summary judgment estimated that the value of the plants at maturity would exceed $500,000. E.R. J20. Jaffee estimated the value of the plants at the time of the seizure to be less than $1,000. Pet. App. A13.[3] The value of the property was approximately $95,000. Pet. App. A3.

On cross-motions for summary judgment, the district court entered a judgment of forfeiture in favor of the United States. Pet. App. A12-A19. The court rejected petitioner Jaffe's contention that forfeiture of the house, garage, and five-acre tract was so excessive as to violate the Eighth Amendment of the Constitution. Pet. App. A17-A18. The court found it significant that Jaffee was not growing the mari-

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and his probation was continued for two more years. E.R. J19-J20.

[3] The government's estimate was based on a wholesale value of approximately $2,000 per pound and a yield of between two and three pounds per mature plant. By those calculations, the plants, at maturity, would have been worth between $500,000 and $1 million. E.R. J20; see Pet. App. A3.

juana for his personal use. The court also was unpersuaded by Jaffee's estimate that the marijuana was worth only $1,000 at the time of seizure, because "[i]f the officers had discovered the plants later in the growing season, the government estimates that the value of the crop would have exceeded the value of the property." *Id.* at A18. The court also declined to limit the forfeiture to the garden plot in which marijuana was cultivated, since the applicable forfeiture statute, 21 U.S.C. 881(a)(7) (Supp. V 1987), provided for the forfeiture of "the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part" to commit a drug offense. Pet. App. A18-A19.

3. The court of appeals affirmed the judgment of forfeiture. Pet. App. A1-A11. The court first concluded that the Eighth Amendment proportionality analysis that it had applied in the context of criminal forfeitures does not apply to civil in rem forfeitures. *Id.* at A4-A7. The court "found no case holding the eighth amendment applicable to civil forfeiture actions," and it observed that "[t]he text of the eighth amendment 'suggests an intention to limit the power of those entrusted with the criminal-law function of government.'" *Id.* at A4-A5, quoting *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977). The court of appeals also relied on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974), where this Court explained that under traditional principles of civil forfeiture, an object used in the commission of an offense is itself guilty, and forfeitable to the State, regardless of the innocence of the owner. Because civil forfeiture focuses on the involvement of the property, not punishment of the owner, the court of appeals found the proportionality

analysis suggested by its prior criminal cases to be inapplicable. Pet. App. A5-A7. The court similarly held that the district court had correctly declined to forfeit less than the entire five-acre tract, in light of Jaffee's "extensive operation" and his deliberate choice to risk forfeiture when he decided to grow marijuana on the property. *Id.* at A9.

Finally, the court of appeals rejected Jaffee's challenge to the constitutionality of the forfeiture statute's provision for seizure of property by the Attorney General. The statute permits seizure "upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims," 21 U.S.C. 881(b) (1982 & Supp. V 1987), without prior review by a judicial officer. In this case, however, the court of appeals noted that "the government sought prior approval from a magistrate before seizing the property." The court concluded that "[t]his precautionary prior judicial review sufficiently cured any possible constitutional defect." Pet. App. A10.

ARGUMENT

1. The statute at issue here, 21 U.S.C. 881(a)(7) (Supp. V 1987), provides for the forfeiture of "[a]ll real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit * * * a violation of this subchapter." The district court declared the five-acre lot and the house and garage situated on that lot to be forfeited to the United States under 21 U.S.C. 881(a) (1982 & Supp. V 1987), because they were used to cultivate marijuana. Petitioners contend (Pet. 10-17) that the forfeiture of the whole parcel was excessive under the Eighth Amendment. This argument is without merit. The court of appeals correctly held that the

Eighth Amendment does not apply to in rem civil forfeiture proceedings. But even if the Eighth Amendment is applicable, the forfeiture at issue here is not excessive or disproportionate under that Amendment.

a. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Court recently held that the Excessive Fines Clause of the Eighth Amendment does not limit the amount of punitive damages that may be awarded in a civil action between private parties. *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989). In so holding, the Court observed: "Given that the Amendment is addressed to bail, fines, and punishments, [the Court's] cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments." *Id.* at 2913. The text of the Amendment and the Court's understanding of its scope demonstrate that the Amendment is inapplicable in the present setting as well.

A forfeiture action brought under 21 U.S.C. 881 (1982 & Supp. V 1987) is not an in personam criminal prosecution of the owner of the property, and the resulting forfeiture is not a "punishment" or "fine" imposed on the defendant in such a prosecution. Rather, a forfeiture action under Section 881 is a civil in rem proceeding, in which the property itself (not the owner) is the defendant. The Court discussed the origins and bases for in rem forfeitures in *Calero-Toledo*, which arose under a forfeiture statute patterned after 21 U.S.C. 881(a) (1982 & Supp. V 1987). See 416 U.S. at 686-687 & n.25. There, the Court sustained the forfeiture of a yacht on which marijuana was discovered, even though the yacht was in the possession of a lessee at the time and the owner

was innocent of any wrongdoing. The Court explained that in rem forfeiture of objects used in violation of customs and revenue laws has deep historical roots in English practice, under which the objects themselves were treated as the offenders. That practice was continued in this country, from the adoption of the Constitution to the present day, and has been applied as well under other statutes providing for the forfeiture of property used in a variety of criminal enterprises. *Id.* at 680-685. Of particular relevance here, the Court noted that forfeiture of property that has been used—and may be used again—in violation of the narcotics laws prevents further illicit use of the property and discourages trafficking in controlled substances. *Id.* at 686-687.[4] See also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984). Thus, both history and this Court's decisions establish that " 'the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*.' " *Calero-Toledo*, 416 U.S. at 684, quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

As petitioners note (Pet. 10-11), the Court in *Browning-Ferris* did not foreclose the possibility that the Excessive Fines Clause might apply in some types of civil actions brought by the government. Thus, the Court pointed out that the suit was between private parties and that the State itself had not "used the

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[4] The courts of appeals also have recognized that civil forfeiture under 21 U.S.C. 881 serves broad remedial purposes that differ from those underlying the criminal provisions of the drug laws. See *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989) (citing cases); *United States* v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987), cert. denied, 108 S. Ct. 1270 (1988); *United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10, 13 (2d Cir. 1982).

civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 109 S. Ct. at 2920. Contrary to petitioners' suggestion (Pet. 10-11), however, there is no occasion here to consider whether the Eighth Amendment has any application beyond criminal prosecutions. For the reasons given above, the origins, rationale, and purposes of in rem forfeiture demonstrate that it is considerably removed from the Eighth Amendment's purpose of preventing personal oppression of individuals. Moreover, the clause of the Eighth Amendment that speaks most directly to the imposition of personal punishment through deprivations of property prohibits only excessive "fines"; it does not mention excessive "forfeitures." The significance of this omission is underscored by the fact that the Constitution elsewhere regulates the imposition of forfeitures, but only in one particular way: Article III, Section 3, prohibits the forfeiture of estates resulting from a conviction for treason—a personal punishment imposed on the convicted defendant. The fact that the Eighth Amendment refers only to "fines," which both impose personal punishment and give rise to personal liability on the part of a defendant, indicates that in rem forfeiture of property is outside the scope of the Clause.

Petitioners contend (Pet. 11-12) that the Eighth Amendment is applicable because civil forfeiture actions have sometimes been described as "quasi-criminal" in nature, even though they are not criminal prosecutions. However, in rem forfeiture actions have been regarded as "criminal 'only for the purposes of the fourth amendment search and seizure clause [*One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965)] and the fifth amendment self-incrimination clause' [*Boyd* v. *United States*, 116 U.S.

616 (1886)]. * * * 'The Court has otherwise found that forfeiture statutes are civil for purposes of the double jeopardy clause and the broader range of constitutional protections applied to criminal trials'." *United States* v. *Riverbend Farms, Inc.*, 847 F.2d 552, 558 (9th Cir. 1988). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States* v. *Ward*, 448 U.S. 242, 251-252 (1980); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 398-400 (1938); *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931).

The holding below that the Eighth Amendment does not apply in in rem forfeiture proceedings is consistent with the identical holding by the Fourth Circuit in *United States* v. *Santoro*, 866 F.2d 1538, 1544 (1989). Petitioners have cited no contrary appellate precedent, and we are aware of none.[5] Petitioners cite (Pet. 12) only decisions holding that the Eighth Amendment is applicable to *criminal* forfeitures under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963 (1982 & Supp. V 1987), and the federal drug laws, 21 U.S.C. 853 (Supp. V 1987). *United States* v. *Busher*, 817 F.2d 1409, 1415 (1987), aff'd after remand, 872 F.2d 431 (9th Cir. 1989) (Table); *United States* v.

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[5] In *United States* v. *A Parcel of Land With a Building Located Thereon at 40 Moon Hill Road*, No. 89-1191 (1st Cir. Sept. 1, 1989), a civil forfeiture action, the court concluded that the forfeiture of a parcel of real property under 21 U.S.C. 881(a)(7) (Supp. V 1987) was not disproportionate for purposes of the Eighth Amendment, without separately addressing the applicability of the Amendment. See slip op. 7-9.

Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987). Those decisions have no application here.[6]

b. Even if the Eighth Amendment is applicable in this setting, the forfeiture of the property at issue here plainly was not "grossly" or "significantly" disproportionate to Jaffee's offense for purposes of that Amendment. See *Solem* v. *Helm*, 463 U.S. 277, 288, 303 (1983); *United States* v. *Busher*, 817 F.2d at 1415. Petitioners' argument to the contrary rests entirely on Jaffee's estimate that, at the time of seizure, the plants were worth less than $1000, while the lot and appurtenances were worth approximately $95,000. But as the district court observed in holding that the forfeiture was not excessive under the Eighth Amendment, "[t]his was not a small amount of contraband for personal use" even at the time of seizure, and if the officers had discovered the plants later in the growing season, their value would have far exceeded the value of the forfeited property. Pet. App. A18. The statute provides for the forfeiture of all real property, including any lot or tract of land, "which is used, *or intended to be used*," to commit a violation of the relevant sections of the drug laws. 21 U.S.C. 881(a)(7) (Supp. V 1987) (emphasis added). Petitioners do not dispute that the property was "intended to be used" to grow the

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[6] Any divergence between the decision below and the decisions in *Busher* and *Littlefield* presents only an intracircuit conflict, which does not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). As petitioners concede (Pet. 13), in *United States* v. *Monroe*, 866 F.2d 1357 (1989), the Eleventh Circuit left open the question whether the Ninth Circuit had correctly applied the Eighth Amendment even in a criminal forfeiture case. 866 F.2d at 1367.

marijuana to maturity, and the value of the marijuana at that time therefore is clearly relevant.[7]

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[7] Petitioners contend (Pet. 16-17) that the district court erred in granting summary judgment because there was a dispute concerning the value of the contraband and because, in their view, the DEA agent's affidavit contained inadmissible hearsay on the issue of valuation. These objections are without merit. The government did not challenge Jaffee's estimate that the value of the immature plans was $1000, and petitioners did not dispute that the value of the plants at maturity would have been many times that amount. There thus was no disputed issue of material fact, but only an issue of law concerning the relevance of the latter value—an issue that was properly resolved on a motion for summary judgment.

Petitioners' hearsay objection to the DEA agent's valuation of the marijuana at maturity is without merit because the agent relied on official data gathered by governmental entities, which are admissible under Fed. R. Evid. 803(8). In any event, it is well established that the government may rest on reliable hearsay evidence in establishing probable cause to believe that property is subject to forfeiture; in an in rem proceeding, that showing shifts to the claimant the burden of showing that the property is not subject to forfeiture. See *United States* v. *Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 n.3 (6th Cir. 1989); *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 897-900 (1st Cir. 1987); *United States* v. *A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986); *United States* v. *One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276, 1281-1283 (9th Cir. 1983). There is no reason why a different rule should be applied here—especially since petitioners do not dispute the government's showing that the property was used in connection with illegal drug activities and the constitutional defense requires the owner to bear the burden of showing that the forfeiture was grossly disproportionate. Petitioners do not deny that, if the value of the marijuana at maturity is a relevant consideration, the marijuana would have been ~~sujeiently~~ sufficiently valuable at maturity to eliminate any contention that the forfeiture was grossly disproportionate.

In this case, moreover, there can be no contention that the owner of the property was innocent of any wrongdoing: Jaffee pleaded guilty under state law to the manufacture of marijuana, and he does not dispute in this Court that the marijuana was grown under his control. Nor is this an instance in which forfeiture is premised on the presence of a very small quantity of marijuana that may have been intended only for personal use (compare *In re Forfeiture of 719 North Main*, 175 Mich. App. 107, 117, 437 N.W.2d 332, 337 (Mich. 1989), quoted at Pet. 18 n.1) or in which the forfeited property had only an incidental relation to a single drug transaction (see *United States* v. *Premises Known as 3639-2nd Street, N.E.*, 869 F.2d 1093, 1095-1096 (8th Cir. 1989), distinguishing *United States* v. *Certain Lots in Virginia Beach*, 657 F. Supp. 1062 (E.D. Va. 1987)). In a similar case, the First Circuit recently rejected an Eighth Amendment challenge to the forfeiture of real property where the marijuana plants involved—which were fewer in number but more mature than those seized here—reflected a "large-scale, high-volume marijuana production operation." *United States* v. *A Parcel of Land With a Building Located Thereon at 40 Moon Hill Road*, slip op. 7-9.

In the end, proportionality and excessiveness under the Eighth Amendment depend on "evolving standards of decency that mark the progress of a maturing society." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). Modern standards are largely determined by legislative and congressional judgments. See, *e.g.*, *Solem* v. *Helm*, 463 U.S. at 299. It is beyond question that current laws manifest a firm commitment at all levels of government to the eradication of drugs from society, and

the use of the forfeiture mechanism is an essential part of that effort. See *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2654-2655 (1989). It therefore is not surprising that petitioners' argument fails under the precedents on which they rely for still another reason: they have made no showing that the forfeiture here is out of line with other forfeitures authorized by federal or state law. Compare *Solem* v. *Helm*, 463 U.S. at 292, 298-300; *United States* v. *Busher*, 817 F.2d at 1415-1416.

2. Petitioners also contend (Pet. 17-19) that the court of appeals erred in concluding that principles of judicial restraint in applying the forfeiture sanction to a tract of real property are inapplicable in civil forfeiture cases. Petitioners mischaracterize the holding below. The court of appeals did not find the principles upon which petitioners rely inapplicable here; it instead held, as did the district court, that forfeiture of the lot and appurtenances is appropriate under those principles. See Pet. App. A7-A9, A18-A19. That fact-bound holding by both courts below does not warrant review.

In the two cases upon which petitioners principally rely, the applicable statute provided for forfeiture of the "lot or tract" on which a distillery was situated. The courts in those cases declined to forfeit an entire farm (totalling 130 or 150 acres) simply because an illegal distillery was situated on one portion of the farm. The courts reasoned that the statutory term "lot" presumably referred to a plot of a standard size in a village, and that the term "tract" should be read in a comparably circumscribed manner that did not embrace those portions of a large farm that had no connection to the distillery. *United States* v. *Certain Piece of Land*, 25 F. Cas. 366 (D. Cal. 1870) (No.

14,767); *United States* v. *About 151.682 Acres of Land*, 99 F.2d 716 (7th Cir. 1938).

The circumstances of this case are far different. The evidence showed that the house and garage were used in growing marijuana, and there accordingly is no question regarding the propriety of the forfeiture to that extent. The courts below likewise did not abuse their discretion in treating the five-acre parcel at issue here as a single "lot" or "tract" for purposes of 21 U.S.C. 881(a)(7) (Supp. V 1987). The area in question is zoned for farm use only, with a five-acre minimum for any one parcel, and a well that was situated a good distance from the house was the only source of water for the property, including the marijuana. E.R. J19; E.R. K11-K12. Indeed, the subject property is identified in the caption in this case as "Tax *Lot* 1500" (emphasis added), thereby indicating that the entire five acres, rather than some fraction thereof, is regarded as the appropriate unit of land generally, and therefore is properly regarded as the unit to be forfeited under a statute applying to any "lot or tract" that is used in whole or in part for drug-related purposes.

This approach is consistent with that taken in other cases. In *United States* v. *Certain Piece of Land*, although the court declined to declare the entire farm forfeited, it did order forfeiture of a separately platted, several-acre tract within the farm on which the distillery was situated. 25 F. Cas. at 367. Accord, *Norbriga* v. *United States*, 55 F.2d 146, 149 (1st Cir. 1932). The other cases upon which petitioners rely highlight this distinction between a small, well-defined lot or tract, on which the prohibited operations occurred, and a much larger farm. See *United States* v. *About 151.682 Acres of Land*,

99 F.2d at 718, 719-720; *United States* v. *Twenty Acres of Land*, 213 F. Supp. 808, 811-812 (E.D. Tenn. 1962).

3. Finally, petitioners contend (Pet. 20-24) that the seizure of the premises did not comply with due process. They first argue (Pet. 21-22) that Jaffee was entitled to an opportunity for a pre-seizure adversarial hearing. This Court has made it clear, however, that "'[D]ue process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture'." *United States* v. *Von Neumann*, 474 U.S. 242, 249 n.7 (1986); see also *United States* v. *$8850*, 461 U.S. 555, 562 n.12 (1983).[8] Petitioners maintain (Pet. 21-22) that this case is distinguishable from *Von Neumann* and *$8850* because it involves real property, not personal property that could have been transferred out of the jurisdiction in the absence of the seizure. But it also is distinguishable from those cases on the ground that Jaffee was not ousted from his possession of the property pending the completion of forfeiture proceedings. He therefore was not subjected to any substantial deprivation of property during that interim period.

In *Calero-Toledo*, the Court rejected the claim that a pre-seizure hearing was required. The Court noted that the seizure served significant governmental interests by allowing the assertion of in rem jurisdiction over the property, that pre-seizure notice might frustrate the forfeiture scheme by enabling the person in possession to remove or destroy the property,

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[8] See also *United States* v. *One 1980 Red Ferrari*, 875 F.2d 186, 189 (8th Cir. 1989); *United States* v. *One 1985 Cadillac Seville*, 866 F.2d 1142, 1147 (9th Cir. 1989); *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450 n.5 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).

and that the seizure was initiated by disinterested government officials. 416 U.S. at 679-680. Thus, the moveability of the property was only one of the factors upon which the Court relied. Here, the arrest of the property was equally essential to obtain in rem jurisdiction over it, and the seizure was initiated by disinterested government officials. In addition, although the house, garage, and land were not moveable, there was a substantial governmental interest justifying the limited seizure, in order to prevent any continuing use of the property for drug-related purposes and any destruction of evidence or waste of the property. Moreover, here, unlike in *Von Neumann*, *$8850*, and *Calero-Toledo*, a warrant for arrest of the property was approved by a magistrate prior to the seizure, and Jaffee could not seriously contest the existence of probable cause, since he had pleaded guilty to the state-law charges.

In any event, as Jaffee concedes (Pet. 21), there is no circuit conflict on this issue that warrants review. In *United States* v. *A Single Family Residence*, 803 F.2d at 631-632, the court held that a seizure of real property may be accomplished pursuant to a warrant issued by the clerk of court, without prior approval by a judicial officer. Accord *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988). In *United States* v. *South Half of Lot 7 & Lot 8, Block 14*, 876 F.2d 1362, 1368-1372 (8th Cir. 1989), the court held that approved by a judicial officer is required for such a warrant to issue.[9] In neither case, however, did the court hold that a pre-seizure *adversarial* hearing was required.

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[9] The Eighth Circuit has granted the government's petition for rehearing en banc in the latter case. See 883 F.2d 53 (1989).

Petitioners also argue (Pet. 23-24) that due process required a prompt *post*-seizure opportunity for a hearing. That opportunity, however, was afforded in these in rem forfeiture proceedings, which were instituted simultaneously with the arrest of the property. The timeliness of the opportunity for a hearing in such a proceeding is governed by the standards enunciated in *United States* v. *$8850*, 461 U.S. at 564-570. Petitioners do not contend that those standards were violated here. This due process claim therefore does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SARA CRISCITELLI
Attorney

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